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# **FIFA ban of third party ownership of football players' economic rights and Article 101 of the Treaty on the Functioning of the European Union**

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## **Abstract**

*On 1 May 2015 entered into force Article 18ter of the FIFA Regulations on the Status and Transfer of Players which main objective is to address third party ownership of football players' economic rights (most commonly known as TPO) and to ban this practice from the football industry. This FIFA's decision represents a relevant change to the football industry considering that TPO was a widespread common practice, employed by football clubs and investors worldwide. To this extent the solution adopted by FIFA had several opponents and a debate was launched on whether the complete ban of TPO is the most adequate way to tackle the problems associated with this phenomenon. One of the identified legal aspects concerning the new FIFA regulations is related to its compatibility with EU competition rules, in particular with Art. 101 of the Treaty on Functioning of the European Union (TFEU). Based inter alia on this legal provision, several football key actors engaged in legal actions against the ban imposed by FIFA, including complaints before the European Commission (e.g., the Spanish and the Portuguese football leagues complaint alleging that this new rule infringes EU competition rules, on the one hand, and the UEFA and FIFPro complaint questioning the legality of third party player ownership, on the other hand). In this context, the subject matter of this dissertation is focused on the compatibility of the TPO ban with Art. 101 TFEU. The methodology used to address this issue follows closely the approach embraced by the European Court of Justice in the Meca-Medina case, which in turn is also followed by the European Commission when assessing if a rule adopted by a sports association infringes Art. 101 TFEU. The main findings of this dissertation, based on the identified methodological approach, raise legal concerns about the legitimacy, under Art. 101 TFEU, of some of the goals pursued by the TPO ban, as well as question the proportionality of the adopted measure, considering the identified potential less restrictive options available to the attainment of such goals. This conclusion renders difficult to sustain a possible exemption of the TPO ban under Art. 101(3) TFEU, raising therefore serious doubts on the compatibility of the FIFA ban with Art. 101 TFEU.*

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## Abbreviations and acronyms

Art(s).	–	<i>Article(s)</i>
CJEU	–	<i>Court of Justice of the European Union</i>
Commission	–	<i>European Commission</i>
eds.	–	<i>editors</i>
e.g.	–	<i>exempli gratia</i>
etc.	–	<i>et cetera</i>
EU	–	<i>European Union</i>
FIFA	–	<i>Fédération Internationale de Football Association</i>
FIFA TMS	–	<i>Fédération Internationale de Football Association Transfer Matching System</i>
FIFPro	–	<i>Fédération Internationale des Associations de Footballeurs Professionnels</i>
GDP	–	<i>Gross Domestic Product</i>
ibid.	–	<i>Ibidem</i>
no.	–	<i>number</i>
OJ	–	<i>Official Journal of the European Union</i>
op. cit.	–	<i>opus citatum</i>
p(p).	–	<i>page(s)</i>
RSTP	–	<i>Fédération Internationale de Football Association Regulations on the Status and Transfer of Players</i>
TFEU	–	<i>Treaty on the Functioning of the European Union</i>
TV	–	<i>television</i>
UEFA	–	<i>Union des Associations Européennes de Football</i>
UK	–	<i>United Kingdom</i>
vol.	–	<i>volume</i>

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## I. Introduction

Following the entry into force of Art. 18ter of the FIFA Regulations on the Status and Transfer of Players on 1 May 2015 (*TPO ban*), which main objective is to ban third party ownership of football players' economic rights (most commonly known as TPO), a wide debate was launched in the football industry on this topic. While there are several supporters of the measure adopted by FIFA, considering the widespread use of TPO by clubs and investors worldwide, several criticism were raised against an outright ban of this practice. The opponents of this FIFA rule, although recognising to some extent the main arguments put forward to ban TPO – mostly related to the lack of transparency of these deals and potential conflicts of interest which may negatively impact the integrity of football and its competitions – tend to focus on its benefits, stating that this is an important financial tool to provide clubs with liquidity to fund their sporting activity, therefore reducing the competitive gap between the poorer and smaller clubs *vis-à-vis* the richest and biggest clubs.

Considering the popularity of football, a sport that has millions of fans and generates great passion between people around the world, football industry is currently an important sector in the European (and also global) economy. It also involves many and different stakeholders, not only those closely related to the competitions itself: from the *big media* eager to acquire television and other broadcasting rights of the most popular competitions to companies offering millionaire deals to athletes, clubs and leagues to secure their sponsorship, there are several other examples of a great number of deals surrounding the football market. It is also undeniable the impressive revenue generated by the industry, in particular when it comes to players' transfers between clubs: for instance, in 2015, 13,558 transfers were completed all over the world and in terms of spending on transfer fees, the total amount reached USD 4.18 billion<sup>1</sup>.

Taking into account the economic importance of football and the considerable amount of stakeholders involved, the new rule is a major issue for both the clubs and the investors involved in this practice. Many questioned the compatibility of such prohibition with EU competition rules, in particular with Art. 101 TFEU, and some key actors, such as the Spanish and the Portuguese football leagues engaged in legal actions

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<sup>1</sup> FIFA (2016). Press release *FIFA TMS reports Global Transfer Market spending up 44.2% since 2011*.

to set aside the TPO ban.

While there is still no final decision on this issue and much debate has already been produced across the EU, this dissertation aims at providing some guidance on the potential assessment of the compatibility of the TPO ban with Art. 101 TFEU and reaching conclusions on whether this measure may be deemed compatible with this legal provision.

In this context, after the introduction in SECTION I, the thesis is structured as follows:

SECTION II – Definition of *third party ownership* and its relevant elements, in order to establish the boundaries of the dissertation;

SECTION III – Outlines the relevant FIFA rules banning TPO and identifies the *prima facie* implications of the ban, in order to focus the assessment on the potential ban's impact on the key actors concerned;

SECTION IV – Identifies and establishes the methodological approach to be used in the assessment of the TPO ban with Art. 101 TFEU;

SECTION V – Analyses if the FIFA rule infringes Art. 101 TFEU, including arguments put forward in support and in detriment of TPO, the Commission decisional practice and the EU courts case law; and

SECTION VI – Concludes on the compatibility of the TPO ban with Art. 101 TFEU.

## II. TPO definition and relevant elements

TPO remounts to Latin America in the 1960's, but it was only since the 1980's that it became widespread, in particular in Europe, during a period of financial crisis of the European football clubs<sup>2 3</sup> which aimed at additional funding opportunities and instruments to finance their sporting investments. In Europe, particular attention was given to TPO after the transfers of the players Carlos Tévez and Javier Mascherano from *Sport Club Corinthians Paulista* to *West Ham United Football Club* (**West Ham**), after being unveiled that a third party owner had the contractual right to force West

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<sup>2</sup> CENTRE DE DROIT ET D'ÉCONOMIE DU SPORT (2014). *Research on third-party ownership of players' economic rights (part II) – Executive Summary* (the **CDES Report**): p. 3. The CDES Report was provided by FIFA to its members with the Circular no. 1420 of 12.5.2014.

<sup>3</sup> LOMBARDI, R., MANFREDI, S. and NAPPO, F. (2014). Third Party Ownership in the field of professional football: a critical perspective. *Business Systems Review*. Vol. 3. Issue 1: pp. 32-47.

Ham to sell the players if a suitable bid was received<sup>4</sup>. Following this case, the English Premier League<sup>5</sup>, followed by the English Football Association<sup>6</sup>, tightened its regulations in order to prohibit TPO of players registered in the English Premier League. Since then, TPO practice was subject to major discussion across the European football leagues<sup>7</sup> and deemed as “*one of the most controversial issues considered by sport governing bodies*”<sup>8</sup>.

TPO has its origin in the classic distinction between two different types of rights linked to a professional football player contract: federative rights and economic rights<sup>9</sup>. A club holding a registered professional footballer’s employment contract is entitled to both of these rights.

Whilst **federative rights** regard players registered in a national association recognized by FIFA that bind the player to the club (thus creating several duties and rights, including the right to be compensated for breach of contract without just cause) and, therefore, are the legal basis for the transfer of athletes between clubs<sup>10</sup>, **economic rights** are linked to federative rights and can be defined as “*any expected financial revenues derived from the federative bond between player and club. Such income should be understood broadly: it can result in money, the exchange of federative rights between clubs, a bonus for players in contract signings, etc.*”<sup>11</sup>. Hence, economic rights are related to the financial income arising from a transfer of a player’s federative rights<sup>12</sup>.

Taking into account the above distinction between federative and economic rights, there

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<sup>4</sup> ABATAN, E. (2012). An Overview of Third Party Ownership in European Professional Football. *EPFL Sports Law Bulletin*. 10/2012: pp. 22-32.

<sup>5</sup> See, for instance, the Premier League Rules for season 2014/15, Rules U.39 and U.40.

<sup>6</sup> See, for instance, the English Football Association Handbook for season 2014/2015, Third Party Investment in Players Regulations 2014/2015, pp. 317-320.

<sup>7</sup> ABATAN, E. (2012). *op. cit.*: p. 22.

<sup>8</sup> KEA EUROPEAN AFFAIRS and CENTRE FOR THE LAW AND ECONOMICS OF SPORT (CDES) (2013). *The Economic and Legal Aspects of Transfers of Players*.

<sup>9</sup> REVELLO, E. (2014). *THIRD PARTY OWNERSHIP IN PROFESSIONAL FOOTBALL – General overview and insight into the most discussed and unconventional tool for financing football clubs*. paper for Dr. Thomas Marx Award 2014: p. 9; ABATAN, E. (2012). *op. cit.*: p. 22; and MELLERO, V. and SOIRON, R. (2012). The dilemma of third-party ownership of football players. *EPFL Sports Law Bulletin*, 10/2012: p. 41.

<sup>10</sup> REVELLO, E. (2014). *op. cit.*: p. 9. As noted by this Author, “*federative rights only exist for those individuals under the auspices of FIFA, as the International Federation, so a third party not adhering to FIFA regulations is not subject to such associative rules*”, *idus est*, a company investing in TPO is not subject to compliance with FIFA rules.

<sup>11</sup> REVELLO, E. (2014). *op. cit.*: p. 9.

<sup>12</sup> MELLERO, V. and SOIRON, R. (2012). *op. cit.*: p. 41. These two Authors state that the dichotomy federative rights/economic rights is “*somewhat reminiscent of the concept of intellectual property rights under French law with the economic rights on the one hand and the moral rights on the other hand*” – p. 41.



are several possible definitions of TPO.

Under an economic perspective, TPO can be described “*as the ownership by a third party of the economic value (i.e. economic rights) of a football player’s federative right*”<sup>13</sup>.

E. ABATAN<sup>14</sup> defines TPO “*as the partial or total ownership of «economic rights» of a player by a third party (i.e. an entity which is not a club), which, in the event of a future transfer, entitles such third party to receive a share*”.

Another often used definition of TPO<sup>15</sup>, given by D. GEEY<sup>16</sup>, reads as follows: “*TPPO [Third Party Player Ownership] in the football industry is where a football club does not own, or is not entitled to, 100% of the future transfer value of a player that is registered to play for that team. There are numerous models for third party player agreements (TPPAs) but the basic premise is that companies, businesses and/or individuals provide football clubs or players with money in return for owning a percentage of a player’s future transfer value. This transfer value is also commonly referred to as a player’s economic rights.*”.

In Europe, TPO may predominantly be structured as:

- *investment TPO*, where the third party pays a certain amount to the club in return for the right to receive a percentage of the proceeds deriving from the transfer of the player’s federative rights **when** and **if** such transfer ever occurs (this means that the third party shall bear the risk of the player never being transferred during the employment contract term). This type of TPO is commonly used when a club is interested in *buying* a player, but does not have the necessary financial means to pay the transfer fee<sup>17</sup>;
- *financing TPO*, where the third party pays a specific amount to a club in return for the right to receive a certain percentage of the proceeds deriving from the transfer of the player’s federative rights **when** the player is effectively transferred, and secures in addition the right to receive a certain guaranteed amount (which

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<sup>13</sup> *Ibid.*

<sup>14</sup> ABATAN, E. (2012). *op. cit.*: p. 22.

<sup>15</sup> In this regard, REVELLO, E. (2014). *op. cit.*: p. 10, and FERRARI, L. (2012). Some thoughts on Third Party Ownership. *EPFL Sports Law Bulletin*. 10/2012: p. 66.

<sup>16</sup> GEEY, D. (2012). Third Party Player Ownership: A UK Perspective. *EPFL Sports Law Bulletin*. 10/2012: p. 55.

<sup>17</sup> KPMG (2013). *Project TPO*: p. 13.

normally consists in the initial investment plus interest) if the player is not transferred during the term of the employment contract (the club bears the risk of the player never being transferred)<sup>18</sup>. This type of TPO is often used by clubs in order to improve their short-term liquidity<sup>19</sup>.

Under a legal perspective, in the CDES Report TPO is defined as “[t]he entitlement to future transfer compensation of any party other than the two clubs transferring the registration of players from one to the other, with the exclusion of the players’ training clubs as per the solidarity mechanism in accordance with the FIFA Regulations on the Status and Transfer of Players”<sup>20</sup>.

The edition of FIFA RSTP, which introduced the ban on TPO<sup>21</sup>, also contains a definition of this practice in Art. 18ter(1) RSTP: “[n]o club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation”. In this context, *third party* is defined as “a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered”<sup>22</sup>.

It is adopted in this analysis the FIFA’s official definition of TPO contained in the RSTP considering (i) that the object of this dissertation focusses on the implications of the TPO ban in light of EU Competition law, (ii) the RSTP provides a definition of TPO for the purpose of the application of the prohibition, and (iii) the wide scope of the official FIFA’s definition of TPO. Therefore, the term TPO shall designate “***an agreement entered into between a club or a football player and a third party (a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered) whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation***”.

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<sup>18</sup> REVELLO, E. (2014). *op. cit.*: p. 11.

<sup>19</sup> KPMG(2013). *op.cit.*: p. 13.

<sup>20</sup> P. 2.

<sup>21</sup> See the current RSTP in force, of 25.9.2015.

<sup>22</sup> Definition 14 of the RSTP.

### III. FIFA rules banning TPO and *prima facie* identification of concrete implications

On 26 September 2014, FIFA announced its “*decision of general principle*” to ban TPO, with a transitional period<sup>23</sup>. Following this announcement, on 22 December 2014, FIFA addressed to its members the Circular no. 1464, on “*Regulations on the Status and Transfer of Players – third-party ownership of players’ economic rights (TPO)*”, which introduced amendments in the RSTP and banned TPO, effective as of 1 May 2015.

The relevant FIFA provision banning TPO<sup>24</sup> under analysis is binding at national level and must be included without any modification in the football associations’ regulations that are FIFA’s members<sup>25</sup>.

FIFA is the international governing body of association football, governed by Swiss law, currently comprising 209 member associations<sup>26</sup>. One of the objectives of FIFA is “*to control every type of Association Football by taking appropriate steps to prevent infringements of the Statutes, regulations or decisions of FIFA or of the Laws of the Game*”<sup>27</sup>. Therefore, FIFA’s members must “*comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time*”<sup>28</sup> and “*ensure that their own members comply with the Statutes, regulations, directives and decisions of FIFA bodies*”<sup>29</sup>.

Failure to comply with such obligations by FIFA’s members may lead to sanctions, as provided in FIFA Statutes<sup>30</sup>. Hence, football associations under the auspices of FIFA – and respective members, clubs and players – must abide to its rules and regulations, including RSTP and the relevant rules on TPO.

A preliminary approach suggests that the TPO ban poses the risk to potentially affect clubs, third parties engaged in TPO deals (***TPO entities***), players and football supporters. The concrete potential implications may be summarised as follows:

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<sup>23</sup> FIFA (2014). Press release *Executive Committee says stop to third-party ownership of players’ economic rights*.

<sup>24</sup> Please see Annex 1 for the complete version of Art. 18ter of RSTP. The inclusion in the RSTP of this new provision was approved on the FIFA Executive Committee meeting held on 18 and 19 December 2014 and announced to the members of FIFA *via* circular no. 1464 of 22.12.2014.

<sup>25</sup> Art. 1(3) a) of the RSTP.

<sup>26</sup> See “About FIFA – Who we are”, retrieved at [www.fifa.com](http://www.fifa.com).

<sup>27</sup> Art. 2d) of FIFA Statutes (April 2015 edition, the ***FIFA Statutes***).

<sup>28</sup> Art. 3(1) a) FIFA Statutes.

<sup>29</sup> Art. 3(1) d) FIFA Statutes.

<sup>30</sup> Art. 13(2) FIFA Statutes.

01. Football clubs, which must comply with the rule, are prohibited to use one of the previously available investment sources, in particular the one provided under TPO;
02. TPO entities – natural or legal persons, other than the two clubs transferring a player from one to the other, who provide clubs or players with capital in return for owning a percentage of a player’s future transfer value – are prohibited to pursue their economic activity in this field;
03. Regarding football players, there is the risk that certain transfers – in particular those involving TPO – will not take place, considering that the TPO investment is prohibited and clubs are not able to acquire and/or sell certain footballers due to the unavailability of other funding sources;
04. In what regards football supporters, the elimination of the TPO poses the risk to lower the quality of the offered *product* (considering that the clubs may not be able to hire more expensive, therefore better players) and, in addition, to increase the respective price (in the absence of TPO, clubs are required to procure different or more traditional sources of investment and to finance the totality of the acquisition cost of a player, therefore potentially increasing their expenditure).

Furthermore, it should be noted that a relevant part of transactions involving TPO takes place within players’ international transfers, in particular in transfers involving cross-border transactions between European clubs<sup>31</sup>. Therefore, the TPO ban also poses the risk to potentially affect such European transactions, which in several cases involve at least two Member States.

#### **IV. TPO ban: the methodological approach under EU competition rules**

In accordance with EU courts case law<sup>32</sup> and the Commission’s<sup>33</sup> *acquis*, sport activities

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<sup>31</sup> INTERNATIONAL CENTRE FOR SPORTS STUDIES (CIES) (2013). *Third-Party Ownership of Players’ Economic Rights – Executive Summary* (the **CIES Report**, which is the first study mandated by FIFA to assess TPO). In accordance with the CIES Report, p. 6, third party revenue on international transfers in Europe accounts for more than 50% of the global amount of third party revenues generated across the globe in 2013 (such analysis includes Asia, Africa, Europe, North America, South America and Oceania).

<sup>32</sup> CJEU judgements in the following cases: Case 36/74, *Walrave v Union Cycliste Internationale*, § 4; Case 13/76, *Gaetano Donà v Mantero*, § 12; Case C-415/93, *URBSF v Bosman*, § 73; Joined Cases C-51/96 and C-191/97, *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union Européenne de judo (C-51/96) and François Pacquée (C-191/97)*, §§ 41 and 42; Case C-176/96, *Lehtonen and Castors Braine*, §§ 32 and 33; and Case C-519/04 P, *Meca-Medina and Majcen v Commission*, § 22 (see also judgement of the Court of First Instance in Case T-313/02 *Meca-Medina and Majcen v Commission*, § 44).

are subject to the application of EU law, including Arts. 101 and 102 TFEU, in so far as these constitute an economic activity. However, when assessing sport related cases, the EU *acquis* also recognises that sport has certain specific characteristics – the so-called *specificity of sport*<sup>34</sup> – which must be taken into due consideration. The specificity of the European sport can be approached through two prisms<sup>35</sup>:

- (01) the specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;
- (02) the specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport.

However, it also stems from the CJEU case law that the specificity of sport “*cannot be construed so as to justify a general exemption from the application of EU law*”<sup>36</sup> and that the assessment on whether a particular sporting rule is in line with the EU law must be made on a case-by-case basis. The CJEU *Meca-Medina* judgement<sup>37</sup> is a landmark ruling where the court applied Arts. 101 and 102 TFEU (former Arts. 81 and 82 of the European Community Treaty) to a sporting rule adopted by a sports association and provides important guidance on the assessment of such rules under those legal provisions. The CJEU first found that “*where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine, given the specific requirements of [Arts. 101 and 102 TFEU], whether the rules which govern that [sporting] activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction*

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<sup>33</sup> Commission decisions in the following cases: Case 37.576 – *UEFA’s broadcasting regulations*, § 47; COMP/37 806 *ENIC/ UEFA*, § 25; COMP/C.2-37.398 – *Joint selling of the commercial rights of the UEFA Champions League*, § 105; Case COMP/39471 – *Certain joueur de tennis professionnel /Agence mondiale antidopage, ATP Tour Inc. et Fondation Conseil international de l’arbitrage en matière de sport*, § 19.

<sup>34</sup> EUROPEAN COMMISSION (2007). *White Paper on Sport*. COM(2007) 391 final: p. 13.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Case C-519/04 P, *Meca-Medina and Majcen v Commission (Meca-Medina case)*.

*or that abuse affects trade between Member States*”<sup>38</sup>.

In this context, the CJEU considered the notion of *purely sporting rules* as irrelevant for the question of the applicability of EU competition rules to the sport sector<sup>39</sup>. Also, based on the principles set up in the *Wouters* judgement<sup>40</sup>, the court reiterated that, for the purpose of application of Art. 101(1) TFEU to a particular case account must be taken of (i) the overall context in which the rules were adopted, their effects and objectives, (ii) whether the restrictive effects are inherent in the pursuit of the objectives and (iii) are proportionate to them<sup>41</sup>.

The approach followed by the Commission in order to assess if a rule adopted by a sports association relating to the organisation of sport infringes Art. 101 TFEU reflects the *Meca-Medina* judgement and comprises the following steps<sup>42</sup>:

**“Step 1.** *Is the sports association that adopted the rule to be considered an ‘undertaking’ or an ‘association of undertakings’? (...)*

**Step 2.** *Does the rule in question restrict competition within the meaning of Article [101(1) TFEU] or constitute an abuse of a dominant position under Article [102 TFEU]?*

*This will depend, in application of the principles established in the Wouters judgment, on the following factors: a. the overall context in which the rule was adopted or produces its effects and its objectives; b. whether the restrictions caused by the rule are inherent in the pursuit of the objectives; and c. whether the rule is proportionate in light of the objective pursued.*

**Step 3.** *Is trade between Member States affected?*

**Step 4:** *Does the rule fulfil the conditions of Article [101(3) TFEU]?”* (emphasis added).

The following SECTIONS are intended to analyse whether the TPO ban infringes Art. 101 TFEU following closely the guidance provided by the CJEU in the *Meca-Medina* judgement and the methodological approach adopted by the Commission.

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<sup>38</sup> *Ibid.*, § 30.

<sup>39</sup> *Ibid.*, §§ 27-31.

<sup>40</sup> Case C-309/99, *Wouters and Others*, §§ 97 and 110.

<sup>41</sup> *Meca-Medina* case, § 42.

<sup>42</sup> EUROPEAN COMMISSION (2007a). *Commission Staff Working Document – The EU and Sport: Background and Context, Accompanying Document to the White Paper On Sport*. SEC(2007) 935: pp. 65-66.

## V. Discussion: TPO ban under Art. 101 TFEU

### (i) *Step 1. – Are FIFA and its member football associations “undertakings” or “associations of undertakings”?*

Art. 101 TFEU is applicable to *undertakings* or *associations of undertakings*. The term *undertaking* is a broad definition which includes “*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*”<sup>43</sup> and *economic activity* is defined as any activity consisting of “*offering goods or services in the market*”<sup>44</sup>.

In the sports sector, both the EU courts and the Commission have established that football teams are undertakings within the meaning of Art. 101(1) TFEU to the extent they carry out economic activities – as noted by the Court of First Instance, the practice of football is an economic activity for the clubs<sup>45</sup>.

National football associations may also be considered both as undertakings and associations of undertakings within the meaning of Art. 101(1) TFEU<sup>46</sup>: (i) they are undertakings in so far as they engage in economic activities; or (ii) associations of undertakings to the extent they constitute groupings of clubs.

FIFA may be considered both an association of undertakings as well as an association of associations of undertakings<sup>47</sup>. FIFA is also an undertaking to the extent it itself engages in economic activities<sup>48</sup>. As noted by the Court of First Instance, “[s]ince the national associations constitute associations of undertakings and also, by virtue of the economic activities that they pursue, undertakings, FIFA, an association grouping together national associations, also constitutes an association of undertakings within the meaning of Article [101 TFEU]”<sup>49</sup>.

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<sup>43</sup> CJEU judgement in Case 41/90, *Höfner and Elser v Macrotron*, § 21.

<sup>44</sup> CJEU judgement in Case 118/85, *Commission v Italy*, § 7.

<sup>45</sup> Court of First Instance (currently General Court of the EU) judgement in Case T-193/02, *Piau v. Commission*, § 69 (*Piau case*). See also the Commission decision of 25.6.2002, Case COMP/37 806 ENIC/ UEFA, § 25.

<sup>46</sup> Commission decision of 27.10.1992, Cases 33384 and 33378 *Distribution of package tours during the 1990 World Cup*, §§ 52-53, and also Commission decision in Case COMP/C.2-37.398 – *Joint selling of the commercial rights of the UEFA Champions League*, § 106. See also the *Piau Case*, § 69.

<sup>47</sup> *Piau Case*, § 72, and also Commission decision in Case *UEFA Champions League*, p. 42, § 106.

<sup>48</sup> Commission decisions in Case *1990 World Cup*, *ibid.*, § 47, and in Case *UEFA Champions League*, *ibid.*, p. 42, § 106.

<sup>49</sup> *Piau Case*, § 72. Also EUROPEAN COMMISSION (2007a). *op. cit.*: p. 67, where the Commission specifically considers that international sports associations such as FIFA may be deemed both as undertaking or an association of undertakings.

(ii) **Step 2. – Does the TPO ban restrict competition within the meaning of Art. 101(1) TFEU?**

a. *The overall context in which the rule was adopted or produces its effects and its objectives*

The TPO ban is a sporting rule adopted by an international football association, inserted in its relevant regulations that “lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations” [the RSTP – see Art. 1(1)]. This rule is in force and applicable since 1 May 2015<sup>50</sup>. As already mentioned in SECTION III above, rules adopted by FIFA (including the TPO ban) are binding on national football associations under the auspices of FIFA and respective clubs and players.

The EU courts<sup>51</sup> and the Commission<sup>52</sup> consider that rules adopted unilaterally by sporting associations can constitute a decision of associations of undertakings for the purpose of applying EU competition law. Hence, the TPO ban is a decision by an association of undertakings for the purposes of Art. 101 TFEU. Therefore, the next step of our analysis is to assess the overall context in which the rule was adopted, its effects and its objectives. In doing so, it is important to call upon the distinction between restrictions *by object* (a restriction that by its very nature has the potential of restricting competition<sup>53</sup>) and *by effect* (a restriction that has appreciable restrictive effects on competition because it negatively affects competition<sup>54</sup>). This distinction is particularly relevant, considering that if a certain agreement or decision by an association of undertakings is considered to be a restriction *by object* it is not necessary for the purposes of applying Art. 101(1) TFEU to demonstrate its actual effects on the market<sup>55</sup>.

In order to determine whether the TPO ban is a restriction *by object*, it is necessary<sup>56</sup> to assess its content and the objective aims pursued by it, as well as the context in which it is (to be) applied. When assessing that context, it is also relevant to consider the nature

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<sup>50</sup> Art. 18ter(2) RSTP.

<sup>51</sup> Cases *Piau*, § 75, and *Meca-Medina*, § 45.

<sup>52</sup> Commission decisions in Cases *ENIC/UEFA*, § 26, and *UEFA Champions League*, § 109. See also EUROPEAN COMMISSION (2007a). *op. cit.*: p. 67.

<sup>53</sup> Commission *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101, 27.4.2004, § 21.

<sup>54</sup> *Ibid.*, § 24.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, § 22.



of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. The actual conduct and behaviour of the parties on the market may also be taken into consideration.

Such assessment should also consider the CJEU case law, in particular the ruling in *Groupeement des cartes bancaires*<sup>57</sup>, where the court clarified that the exemption from proving that a conduct has actual detrimental effects on the market is only applicable where a conduct reveals a sufficient degree of harm. The CJEU has emphasized the importance of past experience in the application of the restriction *by object* concept and expressly stated that such concept must be interpreted restrictively; thus an effect analysis is required (to show the likely harmful effect on competition) unless it is possible to easily demonstrate that the restriction, by its very nature, harms competition. In addition, the CJEU has also clarified that demonstrating that a certain measure is capable of restricting competition is not sufficient to find a *by object* restriction – the measure must reveal inherently or in itself a sufficient degree of harm to competition that would make the analysis of its effects redundant.

Having ascertained that, we shall now proceed with the assessment of the TPO ban.

The decision to ban TPO was announced by FIFA following the conclusions of the two studies mandated by this institution<sup>58</sup>, which are reflected in the respective executive summaries provided by FIFA to its members in Circular no. 1420 of 12 May 2014<sup>59</sup>.

The CDES Report<sup>60</sup> highlights three main recurrent issues related to the TPO: (i) risk of influence on clubs' decision-making process; (ii) predominance of financial rationales; and (iii) risk of multiple conflicts of interest. The CIES Report<sup>61</sup> notes that the main arguments used by some European football associations are that (i) TPO threatens the integrity of the game, (ii) this practice may distort fair competition between clubs, (iii) a general prohibition of TPO would avoid significant amounts being paid to third parties instead of being injected directly into the football system, and (iv) TPO encourages the escalation of transfer fees to the detriment of the game's main stakeholders.

Based on the inquiry conducted by the CDES with football stakeholders, the CDES

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<sup>57</sup> Case C-67/13 P, *Groupeement des cartes bancaires v Commission*, 11.9.2014.

<sup>58</sup> In accordance with FIFA Circulars no. 1335 of 14.1.2013, and 1373 of 2.8.2013.

<sup>59</sup> The CIES Report (which is the first study mandated by FIFA) and the CDES Report (which is the second study mandated by FIFA).

<sup>60</sup> P. 7.

<sup>61</sup> P. 3.

Report identifies the following main set of TPO implications<sup>62</sup>:

01. Football governance: football authorities have no jurisdiction over third parties that operate outside organised football's structures, therefore TPO agreements fall outside the sphere of control of football's judicial bodies. The study highlights that the spread of TPO based on investment funds and financial corporations increases TPO practices outside football regulations that govern transfers of players between clubs. Lastly, the CDES Report points out that TPO takes place outside the scope of certain measures adopted to protect the interests and the integrity of football and its competitions, such as financial control and financial fair-play;
02. Mechanisms of the transfer system:
  - a. Contractual stability<sup>63</sup>: TPO increases the trend to transfer players before the expiry of their contract;
  - b. Solidarity contribution: TPO may affect the solidarity mechanism<sup>64</sup> and training compensation<sup>65</sup> by reducing the amounts collected by clubs in the context of player transfers.
03. Football competitions:
  - a. Integrity of competitions: TPO can undermine the integrity of competitions, considering potential conflicts of interest between the involved actors. The study notes that there are known examples of third parties holding *economic rights* of players belonging to teams in direct competition at domestic or international level;
  - b. Fairness of competitions: TPO has produced a distinction between clubs in terms of acquisition of players, based on whether or not TPO is regulated in a given country<sup>66</sup>. While TPO may improve competitive balance in domestic

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<sup>62</sup> CDES Report: pp. 8-10.

<sup>63</sup> In accordance with FIFA Circular no. 769 of 24.8.2001 "[c]ontractual stability is of paramount importance in football, from the perspective of clubs, players, and the public. The relations between players and clubs must therefore be governed by a regulatory system which responds to the specific needs of football and which strikes the right balance between the respective interests of players and clubs and preserves the regularity and proper functioning of sporting competition."

<sup>64</sup> Please see Art. 21 RSTP, contained in Annex 2.

<sup>65</sup> Please see Art. 20 RSTP, contained in Annex 2.

<sup>66</sup> Considering that prior the TPO ban this practice was prohibited in England and France and restricted in Poland.

competitions in countries where the practice is (before the TPO ban) allowed, it may distort competition between clubs competing in international competitions.

04. Football clubs:

- a. Independence of football clubs: TPO is related to the prevalence of financial rationales within clubs organisation rather than sporting concerns, considering the partial takeover of the clubs' control by actors (TPO entities) seeking primarily short-term and speculating on the acquisition and sale of players' economic rights, which apparently may happen to financially unstable clubs that are looking to secure sporting success at short notice and are in need of financial resources. This impacts player selection, by way of influence of third parties both at club and national team level, and complicates negotiations, as TPO brings legal uncertainty and makes players transfers more difficult to achieve and is even able to make them fail;
- b. Football clubs' finances: while TPO may be a solution for clubs to obtain alternative sources of funding, its systematic use can lead to a loss of control by the clubs over transfer operations and/or sporting policy. In addition, by allowing sharing investment risks between the clubs and TPO entities, TPO allows the clubs to wait to release their players for better compensation which, in accordance with the CDES Report, causes uncertainty.

05. Players:

- a. Promotion and development of sporting talent: while TPO can enable the facilitation of sporting talent, the CDES Report notes that these deals are not necessarily favourable to the long-term career development of the young players, considering their maximising short-term nature;
- b. Movement of players: while TPO offers young players career opportunities which otherwise would be scarce, the study emphasizes that players involved in TPO practices potentially have decreasing control over their career development and geographical mobility and are capable of having impact on players' career choices.

Considering the above implications, the CDES Report identifies three alternative regulatory approaches regarding TPO<sup>67</sup>: (i) a regulatory approach aimed at eliminating TPO; (ii) the authorisation of TPO under duress aimed at promoting transparency; and (iii) no regulation of TPO.

Based on the CIES and CDES Reports, FIFA noted<sup>68</sup> that the discussions within the international football community led by the institution on TPO “*highlighted the lack of a common approach within the football community as to the most appropriate manner of dealing with TPO, even though the majority of football stakeholders seem to acknowledge that such practices may constitute a threat to the integrity of football competitions*”.

The decision adopted by FIFA to ban TPO was supported by this institution by the necessity “*to protect the integrity of the game and the players*”<sup>69</sup> and apparently based, *inter alia*, on the conclusions set out at the CIES and CDES Reports.

Despite the arguments and objectives put forward by FIFA, the rule has, under an EU competition law perspective, important implications on the activity of clubs<sup>70</sup>, and the analysis of the CJEU case law and the Commission decisional practice provides grounds to support that a rule such as the TPO ban is as a restriction of competition within the meaning of Art. 101(1) TFEU.

First, TPO is perceived by clubs as a relevant funding instrument in order to finance their sporting investments and also as a means used to improve their short-term liquidity<sup>71</sup> – which became widespread during a period of financial crisis of the European football – or, in other terms, as a loan source<sup>72</sup>.

In this regard, the Spanish Football League stresses that by using TPO “*clubs also profit from the ability to **anticipate revenue by selling the rights of the squad players in their team**. Thus, in terms of the competitive balance, the use of TPO enables small/medium-sized clubs to maintain their competitiveness against their ‘bigger’ rivals. (...)*”

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<sup>67</sup> P. 13.

<sup>68</sup> FIFA Circular no. 1420 of 12.5.2014.

<sup>69</sup> FIFA (2014). *op. cit.*

<sup>70</sup> Another possible way of addressing the analysis of the TPO ban is under the perspective of the TPO entities. However, considering the scope of this dissertation – which addresses a potential restriction of competition in the context of clubs by way of a decision by an association of undertakings (or an association of an association of undertakings) adopted by a *football authority* – this scenario is not analysed herein.

<sup>71</sup> KPMG (2013). *op. cit.*: p. 13.

<sup>72</sup> LOMBARDI, R., MANFREDI, S. and NAPPO, F. (2014). *op. cit.*: p. 40.

Furthermore, it makes it possible to **increase investment in sports facilities for better training and the development** of young players. (...) the private investor **also ‘shares’ a risk with the club**: when investing in a specific player, the investor also assumes the negative results of the potential investment, which is then shared between the club and the investor, greatly reducing the negative impact on the accounts of the club in question. And finally, taking into account the economic and financial difficulties currently affecting football clubs, it is necessary to support appropriate financing mechanisms in football to foster investment in the sector, since, at present, **most clubs would not be able to survive on their current sources of income.**” (emphasis in original)<sup>73</sup>.

As a result of the ban, TPO entities are prohibited to pursue their economic activity – investment in players’ *economic rights* – and, cumulatively, clubs are prevented from accessing one of the previously available loan sources, which is reflected in their capacity to invest in sporting activities. Hence, the prohibition may be envisaged as having as its object and effect to limit clubs’ investment. Agreements or decisions by an association of undertakings which object is to limit or control investment are considered, by their very nature, to restrict competition to an appreciable extent<sup>74</sup> and, therefore constitute a restriction of competition *by object* under Art. 101(1b) TFEU.

Furthermore, for clubs TPO is also a means of financing the *acquisition* of new players they could not otherwise afford and is an instrument that allows them to increase the quality of their teams by *acquiring* better (thus usually more expensive) players while sharing the risk of investment with a third party<sup>75</sup>. This is particularly relevant for the smaller clubs and for those that do not belong to the largest markets (e.g. the *big five* leagues – England, Germany, France, Italy, and Spain – by opposition to, for instance, Portugal) capable of generating enough revenue to rank them among the richest club, considering that these are the clubs that commonly use TPO<sup>76</sup>. In line with this rationale, S. HORNSBY and C. SMITH highlight that “[n]otably, and clearly a point of

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<sup>73</sup> SPANISH FOOTBALL LEAGUE (2015). FIFA must regulate TPO, not ban it. The point of view of La Liga. *Symposium on FIFA’s TPO ban*. website of Asser International Sports Law Blog.

<sup>74</sup> Commission decision in Case COMP/C.37.750/B2 *Brasseries Kronenbourg, Brasseries Heineken*, §§ 66 and 67.

<sup>75</sup> As noted by REVELLO, E. (2014). *op. cit.*: p. 11. SPANISH FOOTBALL LEAGUE (2015). *op. cit.*, also stresses that “these investments [TPO] may foster the competitiveness of Spanish football clubs in Spain and outside. Indeed, the signing and retention of players’ federative rights cannot be secured without third-party investments.”.

<sup>76</sup> CIES Report: p. 4.

*contention for the smaller clubs, this [TPO] ban is likely to have little effect on clubs like Manchester United, Real Madrid, and Bayern Munich, as they have spending power which removes the necessity to rely on TPO”<sup>77</sup>.*

L. FERRARI also notes that “[m]ost clubs have very limited financial resources and simply cannot afford to buy players to complete the squad, at least not all the players that they may need and not all their first choice players” and “limited financial resources must be used to manage the club, including paying players and rewarding success on the pitch”<sup>78</sup>. He suggests that the financial resources that are not spent by the clubs in the acquisition of players due to the assistance from TPO, may well be used to invest money in the youth academy, victory bonuses or improvement of stadium facilities<sup>79</sup>.

The main argument apparently used by FIFA, based on the CDES Report, is that while TPO may improve competitive balance in domestic competitions where the practice is allowed, it may distort competition between clubs competing in international competitions. In the case of the EU, this primarily relates to UEFA competitions, such as the Champions League and the Europa League, considering that prior to the rule the practice was banned in England and France and restricted in Poland. In accordance with this argument, English, French or Polish clubs would be in disadvantage *vis-à-vis* clubs from other countries where TPO was allowed, both in terms of *acquisition* of players as well as in terms of compliance with UEFA Financial Fair Play rules<sup>80</sup>. This argument does not seem to be straightforward.

As noted by A. RECK<sup>81</sup>, “[w]hile [the prohibition of TPO] might be a disadvantage for French and British clubs, they placed themselves in that position by voluntarily banning (and only at national level) what is a perfectly legal practice”. He also highlights that “[w]ith the same reasoning, different rules on TV rights distribution, merchandising, club legal status (company or civil association) or taxation may lead to similar

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<sup>77</sup> HORNSBY, S. and SMITH, C. (2015). The FIFA ban on third party ownership and EU law. *World Sports Law Report*. Volume 13. Issue 13.

<sup>78</sup> FERRARI, L. (2012). *op. cit.*: p. 67.

<sup>79</sup> *Ibid.*

<sup>80</sup> Which, amongst other rules, require clubs to balance their spending with their revenues and restrict clubs from accumulating debt, through the assessment of the so called “break-even” requirements. In this regard, TPO may be an instrument to balance clubs finances, allowing them to face short-term liquidity problems. *See*, for more information, UEFA Club Licensing and Financial Fair Play Regulations, Edition 2015.

<sup>81</sup> RECK, A. (2012). Third party player ownership: current trends in South America and Europe. *EPFL Sports Law Bulletin*. 10/2012: p. 54.

*disadvantages*". Therefore, it may be difficult to sustain that a prohibition that was adopted voluntarily by some European football associations represents a disadvantage and creates a distinction – this would certainly be a valid argument if such distinction had been introduced by a mandatory rule adopted by an international football authority (such as FIFA or UEFA), imposing the prohibition of TPO just for some football associations (which is not the case)<sup>82</sup>.

Furthermore, it seems that the premise behind such an argument is that there is a competitive balance between clubs across Europe, which is not the actual situation. Indeed, this premise is questionable considering the structure of football competitions in Europe, which is primarily based on national competitions where clubs compete with each other in their own jurisdictions, occasionally participating in European competitions (participation in which is limited only to a certain number of clubs through their top domestic championship<sup>83</sup>). Hence, the strength of European clubs heavily depends on their national market. A reflection of this situation is the existence in Europe of big five leagues (the English, French, German, Spanish and Italian) which are located in the top major EU countries, both in terms of GDP<sup>84</sup> and population<sup>85</sup>. Other potential factors that influence the level playing field between clubs in Europe are, *inter alia*, related to different tax regimes, licensing requirements, television broadcasting rights and sponsorships revenues (which are usually linked to the size of the national market concerned). For example, while FC Porto, one of the leading Portuguese clubs, reached an agreement in 2015 which allows it to receive *circa* 36 million euro per season in exchange for its TV rights, rights to explore advertising spaces in its stadium, sponsorship and broadcasting of its TV channel<sup>86</sup>, Queens Park Rangers, a club ranked in the last place in the Premier League 2014/2015 edition, earned *circa* 64.8 million

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<sup>82</sup> See also LAGOA GHIRA ZINHO, M. (2015). Direitos económicos de terceiros. in MIRANDA, J. and CUNHA RODRIGUES, N. (supervisors). *Direito e Finanças do Desporto*. e-book edited by Instituto de Ciências Jurídico-Políticas and Instituto de Direito Económico, Financeiro e Fiscal, Faculdade de Direito da Universidade de Lisboa: p. 206; and DE ALMEIDA PINTO VIEIRA, M. J. (2015). A (proibição da) detenção de direitos económicos por terceiros. in MIRANDA, J. and CUNHA RODRIGUES, N. (supervisors). *Direito e Finanças do Desporto*. *ibid.*: p. 228.

<sup>83</sup> No more than four clubs, in case of UEFA Champions League (Art. 3.01 of the Regulations of the UEFA Champions League 2015-18 Cycle, 2015/16 Season), and the winner of UEFA member associations' national cup competition, as well as a certain number of other clubs for the competition through their top domestic championship, in case of UEFA Europa League (Art. 3.01 of the Regulations of the UEFA Europa League 2015-18 Cycle, 2015/16 Season).

<sup>84</sup> 2014 data, retrieved at [www.databank.worldbank.org](http://www.databank.worldbank.org).

<sup>85</sup> 2014 data, retrieved at [www.mapsofworld.com](http://www.mapsofworld.com).

<sup>86</sup> See FC Porto notice to the Portuguese Securities Market Commission, last retrieved on 25.3.2016 at <http://web3.cmvm.pt/sdi/emitentes/docs/FR58168.pdf>.

pounds in that season in income generated from the sale of central broadcasting rights (UK and international) and other central commercial rights<sup>87</sup>.

In addition, the participation in UEFA competitions may potentially be regarded as a factor of distortion of the competition between European clubs. First, clubs that manage to qualify to and participate in one of the UEFA competitions are financially benefited *vis-à-vis* clubs competing in the same national competition that don't (considering high financial revenues from these competitions, in particular in case of UEFA Champions League). Second, there is also a differentiation even among European clubs that qualify and participate in UEFA competitions. *De facto*, the total amount of revenues to be distributed among participating clubs is, in general terms, split between fixed amounts (which are equally shared between all the participants) and market pool (which is distributed according to the proportional value of each television broadcasting market represented by the clubs taking part in the UEFA relevant competition)<sup>88</sup>. In this setting, clubs from bigger leagues and located in countries with larger television audiences are financially benefited compared to clubs from smaller leagues and located in countries with minor television audiences.

As a rule, a club's financial strength has a major impact on its competitive strength, by allowing it to hire better players and coaches, and to invest more in infrastructures and training. This observation is supported, for instance, in the fact that the majority of the most successful clubs in the European recent (and some in not so recent at all) history are all ranked among the top-ten clubs in terms of revenue in season 2014/2015, e.g., Real Madrid, Manchester United, Bayern Munich, FC Barcelona, Paris Saint-Germain, Manchester City, Chelsea, among others<sup>89</sup>. Not surprisingly, the top-ten generating revenue clubs in season 2014/2015 are all from the big five leagues<sup>90</sup>.

Therefore, it is not unreasonable to consider that the premise that there is a competitive balance between European clubs is not correct, as there clearly are leagues and clubs in the EU with different sporting and financial strength, which is the result of several

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<sup>87</sup> Data last retrieved on 25.3.2016 at <http://www.premierleague.com/en-gb/news/news/2015-16/jun/020615-premier-league-payments-to-clubs-in-season-2014-15.html>.

<sup>88</sup> UEFA (2015). *UEFA details club competitions distribution system* (for its club competitions for the 2015-18 cycle in the UEFA Champions League and UEFA Europa League).

<sup>89</sup> DELOITTE (2016). *Deloitte Football Money League 2016 - Top of the table*, concise version.

<sup>90</sup> *Ibid.*



existing distortion factors, not related to TPO<sup>91</sup>.

TPO, on the other hand, is regarded as an important tool for smaller clubs and clubs from minor leagues to enhance their competitiveness, allowing them to improve their teams, competitiveness and brands, which ultimately resulted in a consequent increase in sporting success. Futebol Clube do Porto<sup>92</sup>, Sport Lisboa e Benfica<sup>93</sup> and Atlético de Madrid<sup>94</sup> are examples of clubs that achieved sporting success and gained visibility in the European football panorama with the aid of TPO. Under this perspective, the elimination of TPO may create a greater imbalance between European clubs.

In light of the above, taking into account the absence of a competitive balance between EU clubs (a consideration based on the structure of football competitions in Europe, which allows to consider that there is no single market for the European football), there are grounds to argue that the TPO ban may have a negative impact and create a greater imbalance between clubs competing in UEFA (and also in national) competitions in the sense that it discontinues one of the resources used by clubs to improve their competitiveness and, consequently, to improve the competitive balance between clubs participating in UEFA and national competitions. In this setting, there is a non-negligible potential of TPO ban being considered a restriction of competition within the meaning of Art. 101 TFEU.

Taking into account this perspective, it should be noted that in accordance with the Commission, “[a] football club produces, through its team, a sporting event disputing matches with other clubs. These events are sold in several markets.”<sup>95</sup>. Therefore, the primary market where clubs are active and compete with each other may be defined as the *market of the production and sale of the sporting events of football first leagues or*

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<sup>91</sup> See Advocate General Jacobs’ opinion in Case C-501/06 P, *GlaxoSmithKline Services and Others v Commission and Others*, where he reaches comparable conclusions in the context of the pharmaceutical market, §§ 88, 102 and 158.

<sup>92</sup> BIGGERS, S. (2014). What to Look Forward to in 2015: Portuguese Football Edition. *Portugalfutbol*; LEE, S.Y. (2015). The Beginning of the End for the Portuguese Soccer Empire. *Datwinning – An Asian/American Guide to Sports*; and ONE SHORT CORNER (2015). *Third Party Ownership – The Paradox of Portuguese Football*. Since 2000, FC Porto won one UEFA Champions League, one UEFA Cup and one UEFA Europa League, which was cumulated with several national titles (information retrieved at [www.fcporto.pt](http://www.fcporto.pt)).

<sup>93</sup> *Ibid.* Since 2000, Sport Lisboa e Benfica won several national cups and championships and reached two times the finals of the Europa League.

<sup>94</sup> JENSON, P. (2015). Atlético Madrid are among the best in the business in the transfer market... and Diego Simeone is the man calling the shots. *Mail Online*.

<sup>95</sup> Commission decision in Case IV/36 583 – *SETCA-FGTB/FIFA*, 28.05.2002, § 30, free translation from the French language.

*divisions*<sup>96</sup>.

Another slightly different definition stems from the Commission decision in Case *UEFA Champions League*<sup>97</sup> where, in the context of broadcasting rights for football events, the institution considered that the relevant market can be defined as the market for the acquisition of TV broadcasting rights of football events played regularly throughout every year, which includes both domestic and European competitions – such as UEFA Champions League and UEFA Europa League (formerly UEFA Cup). Taking into consideration this market definition and applying it under clubs perspective, the market where clubs compete with each other may be *refined* as the *market of national and European football events played regularly throughout every year*<sup>98</sup>.

One important factor to achieve success in the above identified market is the formation of clubs' teams: the better players a club has the better chances to win or to achieve higher rankings in the competitions it participates. In this regard, players are considered as the production factors necessary for the clubs to compete and achieve success in the football events they are enrolled in and, as such, one of their most important sources of supply<sup>99</sup>. Hence, clubs compete between them in the *acquisition* of players, which is an upstream market in relation to the market of football events played regularly throughout every year and which is formed by the supply and demand for players: clubs are present both as purchasers and suppliers in this market<sup>100</sup>.

By prohibiting TPO, the FIFA rule eliminates a relevant funding source available for clubs to finance the signing of new players, thus depriving purchasing clubs of opportunities which they otherwise would have in the absence of such prohibition<sup>101</sup>.

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<sup>96</sup> See also the Commission decision in Case IV/36 583 – *SETCA-FGTB/FIFA*, § 31.

<sup>97</sup> §§ 55, 62-63 and 79. See also the Commission decision in Case COMP/M.2876 - *Newscorp / Telepiù*, § 55.

<sup>98</sup> See also KEA EUROPEAN AFFAIRS and CENTRE FOR THE LAW AND ECONOMICS OF SPORT (CDES) (2013). *op. cit.*: p. 120.

<sup>99</sup> Opinion of the Advocate General STIX-HACKL in Case C-264/98, *Tibor Balog v. Royal Charleroi Sporting Club ASBL*, §§ 85-86, in C.R. SIEKMANN, R. and SOEK, J. (eds.) (2005). *The European Union and Sport: Legal and Policy Documents*. TMC Asser Instituut. Hague: pp.701-723.

<sup>100</sup> Opinion of the Advocate General STIX-HACKL in Case C-264/98, *Tibor Balog v. Royal Charleroi Sporting Club ASBL*, in BLANPAIN, R. (2008). *European Labour Law*. 11<sup>th</sup> revised edition. Kluwer Law International. Alphen aan den Rijn: p. 312.

<sup>101</sup> REVELLO, E. (2014). *op. cit.*: p. 43, stresses that “[w]hen looking at the major first-division championships worldwide, it become clear that the vast majority of countries have a maximum of 4-5 clubs able to pursue a national title, and such minority is composed every year of the same clubs. Due to the lower and more ephemeral revenues, the majority of clubs have massive problems with bank financing. Therefore, TPO defenders believe that this tool could give an economic empowerment without having to dispose of the main players.”. See also LOMBARDI, R., MANFREDI, S. and NAPPO, F. (2014). *op. cit.*: p. 33.

Under this perspective, in light of the Commission decisional practice<sup>102</sup> a sporting rule interfering with the market of supply and demand of players – as the TPO ban does – may be regarded as a decision of an association of undertakings that has as its object and effect limiting clubs’ sources of supply in terms of players.

Furthermore, the rule, by limiting clubs’ sources of supply in terms of players, is able to hinder their ability – namely of the smaller clubs and clubs from minor leagues, which are the main *users* of TPO – in raising the quality of their sporting performance and in making such performance more profitable. As a consequence, clubs’ ability to develop their activity on the downstream market (that of the football competitions) may also be hampered, as their access to the production factors (players), and therefore to one of their most important sources of supply, is restricted<sup>103</sup>. As such, the TPO ban also has the potential of negatively affecting the market of football events played regularly throughout every year. This has already been found by the Commission in a similar situation, in particular in Case IV/36 583 – *SETCA-FGTB/FIFA*<sup>104</sup>, where FIFA’s rules limiting clubs’ sources of supply of players were at stake.

In this context, the TPO ban poses the risk of negatively influencing the ability of clubs to offer their product, which is the “*sporting event disputing matches with other clubs*”<sup>105</sup>. This hampers clubs’ (and the overall) production and the quality of the production, considering that smaller clubs and clubs from minor leagues are less able to compete with bigger and richer clubs, which creates a higher imbalance in football competitions and hinders the competitive balance. J. M. MONTENEGRO<sup>106</sup> notes that TPO “*has been a key instrument in the enhancement of the squads, in strengthening the competitiveness of clubs and their brands, with a consequent increase in sporting success*”. In doing so, this Author points out the example of Atlético de Madrid, a Spanish club that have made “*frequent use of partnerships with TPO in the acquisition of players for its squad*” and which, “*with revenues of more than one fifth of those generated by its competitors Real Madrid and Barcelona, managed to shatter the bipolar hegemony of these two clubs in Spain by winning La Liga BBVA 2013/2014 and*

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<sup>102</sup> Commission decision in Case IV/36 583 – *SETCA-FGTB/FIFA*, § 31.

<sup>103</sup> *Ibid.* See also the opinion of the Advocate General STIX-HACKL in Case C-264/98, *Tibor Balog v. Royal Charleroi Sporting Club ASBL*, in BLANPAIN, R. (2008). *op. cit.*: p. 312.

<sup>104</sup> §§ 31 and 32.

<sup>105</sup> Commission decision in Case IV/36 583 – *SETCA-FGTB/FIFA*, § 30.

<sup>106</sup> MONTENEGRO, J.M. (2015). Third party ownership: Goliath’s victory. *World Sports Law Report*. Volume 13. Issue 1.

*reaching the final of the UEFA Champions League that season”.*

Considering the approach *supra*, there is a non-negligible possibility of the TPO ban being considered as a decision by an association of undertakings that limits clubs’ (and the overall) production and the quality of the production; thus constituting a restriction of competition within the meaning of Art. 101(1b) TFEU.

In light of the above, there are arguments to sustain, despite FIFA’s intentions and objectives when adopting the TPO ban, that this rule reveals inherently or in itself a sufficient degree of harm to competition and consubstantiates a conduct that may be construed as a restriction *by object* and *by effect*. This is particularly relevant if considered that there is an imbalance between EU clubs and the TPO ban may distort competition between clubs in EU competitions – namely between smaller clubs and clubs from minor leagues *vis-à-vis* the bigger and richer clubs –, thus creating a greater inequality between clubs from different leagues and with different financial strength.

*b. Are the restrictions caused by the TPO ban inherent in the pursuit of its objectives?*

Based on the study conducted within the CDES Report, detailed in SECTION V.(ii).a. above, the set of objectives pursued by the TPO ban may be construed as follows:

01. To protect the **integrity of football and its competitions**, considering that (i) TPO agreements fall outside the sphere of control of football’s structures and judicial bodies; and (ii) can undermine the integrity of competitions due to the risk of potential conflicts of interest;
02. To protect the **fairness of football competitions**, based on the premise that TPO has produced a distinction between clubs in terms of acquisition of players, grounded on whether or not this practice is regulated in a given country;
03. To safeguard the principle of **contractual stability**, taking into consideration that, in accordance with the CDES, TPO increases the trend to transfer players before the expiry of their contract;
04. To impede **capital flows outside football**, in particular in detriment of clubs, thus also safeguarding the principle of **solidarity contribution** and **the training compensation**;

05. To protect **football clubs independence**, considering that TPO allegedly negatively impacts clubs independence in the context of players' transfers by way of influence of third parties;
06. To ensure **football clubs' financial integrity**, assuming that the use of TPO may lead to a loss of control by the clubs over their transfer operations and/or sporting policy and causes uncertainty in case of players' transfers; and
07. To avoid **football players being negatively affected in terms of their career choices** and to **ensure that the long-term career development of young football players is not hindered**.

Having identified the objectives pursued by the TPO ban, the next step is to conduct the inherency assessment, which is performed jointly with the assessment of the legitimacy of each of those objectives in light of the EU Courts and Commission's *acquis*.

#### Integrity of football and its competitions

Integrity of football and its competitions – which is related to uncertainty of results in football competitions, and the necessity of ensuring that such results are not influenced by third parties – is a legitimate objective to be pursued by a sporting rule, as recognized by the Commission<sup>107</sup> and by the CJEU<sup>108</sup>.

Based on the premises that TPO practices may lead to third parties holding economic rights of players acting in competing clubs and therefore potentially affect the integrity of football and its competitions – in light of potential conflicts of interest and the possibility of influence the uncertainty of sports income –, the restriction arising from the TPO ban may be considered as inherent for ensuring the objective at issue. FIFA, by banning TPO, potentially eliminates the identified risk.

#### Fairness of football competitions

Fairness of football competitions – which is related to the necessity to fair sport competitions with equal chances for all clubs – is intrinsically linked to the concept of integrity of football and its competitions and is also granted the statute of legitimate

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<sup>107</sup> Case *ENIC/UEFA*, § 28.

<sup>108</sup> Case *Meca-Medina*, §§ 43 and 45.

objective under EU law<sup>109</sup>.

The answer to whether the restriction caused by the TPO ban is inherent to this objective is, however, not so clear.

As mentioned in SECTION V.(ii).a. above, the main argument apparently used by FIFA, is that while TPO may improve competitive balance in domestic competitions where the practice is allowed, it may distort competition between clubs competing in international competitions – in the case of EU, UEFA competitions. Therefore, it seems that the premise behind such argument is that there is a competitive balance between European clubs. This aspect was already dealt with in detail in SECTION V.(ii).a. above, where the main conclusion was that there are material arguments to consider that the premise of a competitive balance between European clubs is not correct, as there clearly are leagues and clubs with different sporting and financial strength, which is the result of several existing distortion factors, not related to TPO.

In light of the above, there are grounds to argue that the restrictions arising from the TPO ban are not inherent to the objective of ensuring fairness of football competitions, namely of UEFA clubs competitions. Instead, such limitations may be regarded as having a negative impact in the achievement of this objective, by creating a greater imbalance between clubs competing in UEFA (and also in national) competitions in the sense that the rule eliminates one of the resources used by clubs – namely by smaller clubs and clubs from minor leagues – to improve their competitiveness and, consequently, to improve the overall competitive balance.

#### Safeguard of contractual stability

Contractual stability is “*aimed at securing compliance within the obligations of the contract signed by a professional player and a club in order to ensure that this contract will be honoured by both parties*”<sup>110</sup> and is considered to be one of the most important principles in football that underpin transfer regulations<sup>111</sup>. The legitimacy of this

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<sup>109</sup> CJEU ruling in case *Meca-Medina* and Commission decision in Case *ENIC/UEFA*. See also EUROPEAN COMMISSION (2007a). *op. cit.*: p. 68.

<sup>110</sup> KEA EUROPEAN AFFAIRS and CENTRE FOR THE LAW AND ECONOMICS OF SPORT (CDES) (2013). *op. cit.*: p. 14.

<sup>111</sup> FIFA Circular no. 769 of 24.8.2001.

principle was already recognized under the EU law<sup>112</sup>.

However, it should also be noted that a system based on contractual stability does neither prohibits players' transfers, nor it imposes any kind of limits on the number of transfers that a player may be subject to. Such system aims at protecting contracts, unless they are terminated by mutual consent in the context of an agreement on the payment of a transfer fee between the player, the selling club and the buying club<sup>113</sup>. TPO does not contravene such protection – while it may increase the trend to transfer players before the expiry of their contract, it does not imply (nor the CDES Report so acknowledges) that contracts are breached: there is still an agreement on the payment of a transfer fee between a player, the selling club and the buying club, which does not threaten the protection required under the contractual stability. As noted by J. M. MONTENEGRO, “[a]t no time does TPO threaten contractual stability - another criticism very frequently used against their use. This threat consists, rather, of breach of contract and it would not appear that the participation of TPO in the acquisition of players drives this risk. The stability that the clubs cannot do without is that the contracts be fulfilled - and they are fulfilled both by the players staying on for the period provided for by contract and also by putting a termination clause into motion.”<sup>114</sup>.

Furthermore, it is worth noting that the rules on contractual stability (*in casu*, the RSTP) are in themselves not exempt from criticism under a competition law analysis, namely *per* Art. 101 TFUE. As pointed out by Advocate General LENZ in *Bosman*, “those rules replace the normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved and the clubs being deprived of the possibility of making use of their chances, with respect to the engagement of players, which would be available to them under normal competitive circumstances. If the obligation to pay transfer fees did not exist, a player could transfer freely after the expiry of his contract and choose the club which offered him the best terms. [...] Since a

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<sup>112</sup> CJEU judgement in Case C-176/96 - *Lehtonen and Castors Braine*, 13.4.2000, where the court validated the transfer window in the context of basketball competitions. See also KEA EUROPEAN AFFAIRS and CENTRE FOR THE LAW AND ECONOMICS OF SPORT (CDES) (2013). *op. cit.*: pp. 89-90 and 141; and the Commission press releases IP/01/314 (5.3.2001) and IP/02/824 (5.6.2002) regarding the agreement reached between FIFA and the Commission on 05.03.2001 on FIFA Regulations on international football transfers.

<sup>113</sup> COPPO, G. (2011). Contractual Stability and EU Competition Law. *European Sports Law and Policy Bulletin - Contractual Stability in Football*. Issue I-2011. Sports Law and Policy Centre. Rome: p. 302.

<sup>114</sup> MONTENEGRO, J.M. (2015). *op. cit.*

*transfer takes place only if a transfer fee is paid, the tendency to maintain the existing competition situation is inherent in the system”<sup>115</sup>.*

In this regard, G. COPPO highlights that “[t]he rules on contractual stability, by imposing sporting sanctions in players terminating their contract during the protected period, act as a deterrent to unilateral terminations of contracts and basically serve to artificially increase the price of players, obliging clubs to agree on the payment of a transfer fee. Such a system has the effect of favouring the most important and financially viable clubs, since these clubs only can afford to pay high transfer fees and to offer lucrative salaries to players. Players’ mobility tends therefore to be limited to transfer of players to the biggest and richest clubs. High transfer fees have the effect of reducing the choice available to the less viable clubs in respect of player who might have be recruited by them”<sup>116</sup>. This Author concludes that “the RSTP could result to be in breach of EU competition law, and in particular of Article 101 TFEU”, as “by limiting the possibility to engage players, have the effect of restricting he competition among football clubs in the market for the acquisition of players”.

Based on similar premises, it is currently pending before the Commission a complaint lodged by FIFPro<sup>117</sup> challenging the global transfer market system governed by the RSTP as being anti-competitive, unjustified and illegal, where this association considers that the current transfer system is a restriction of competition between clubs<sup>118</sup>.

In light of the above, although contractual stability may be regarded as a legitimate objective, the restrictions arising from the TPO ban are unlikely to be considered as aiming to safeguard its scope of protection – *idus est*, breach of contract – and therefore it is doubtful whether they are inherent to that objective.

#### Impede capital flows outside football in detriment of clubs

Considering that professional football is an economic activity – and, under this perspective, clubs are undertakings within the meaning of Art. 101 TFEU – the practical densification of such an objective means that only clubs can participate in the corresponding relevant product market. Such restriction, by its very nature, has an

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<sup>115</sup> Conclusions of Advocate General LENZ in case *Bosman*, § 262.

<sup>116</sup> COPPO, G. (2011). *op. cit.*: pp. 302-303. This Author notes that the RSTP has shown to be unable to efficiently achieve the legitimate objectives it purposed to – p. 309.

<sup>117</sup> The worldwide representative organization for all professional football players.

<sup>118</sup> FIFPro (2015). *FIFPro’s EU competition law complaint – executive summary*.



anticompetitive object as it envisages excluding other economic agents from a relevant product market.

However, if the underlying purpose of this objective is confined strictly to the protection of the solidarity contribution (as it is pointed out in the CDES Report), with the intention to avoid that part of the sums paid in connection with players' transfers are not included in the determination of the solidarity payments and/or training compensation, the *legitimacy assessment* outcome may differ.

Indeed, the solidarity mechanism is aimed at redistributing a proportion of income to clubs involved in the training and education of a player in order to compensate clubs that invest in the training of young players and to ensure that football competition obey the principle of fairness<sup>119</sup>.

On the other hand, training compensation relates to payments between clubs made in accordance with FIFA relevant rules to cover the development and the training of young players<sup>120</sup>.

Both solidarity mechanism and training compensation are aimed at encouraging youth development and protecting professional clubs that invest in training young players, which are measures that ultimately are intended at ensuring fairness of football competitions. Under this perspective, the Commission attaches great importance to transfer rules that have as their objective to promote youth development and to consolidate solidarity mechanisms between clubs<sup>121</sup>. The CJEU also considers that “*the objective of encouraging the recruitment and training of young players must be accepted as legitimate*”<sup>122</sup>. Hence, the protection of the solidarity mechanism and training compensation, as a means to protect and encourage the recruitment and development of young players may be construed as a legitimate objective to be pursued by the TPO ban.

Assuming that TPO poses the risk to negatively affect the solidarity mechanism and training compensation, by banning it FIFA eliminates this risk and the restriction arising

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<sup>119</sup> FIFA Circular no. 769 of 24.8.2001, and KEA EUROPEAN AFFAIRS and CENTRE FOR THE LAW AND ECONOMICS OF SPORT (CDES) (2013). *op. cit.*: pp. 14, 20 and 42.

<sup>120</sup> FIFA Circular no. 769 of 24.8.2001, and KEA EUROPEAN AFFAIRS and CENTRE FOR THE LAW AND ECONOMICS OF SPORT (CDES) (2013). *op. cit.*: p. 15.

<sup>121</sup> Commission opinion on home-grown players, referred to in its press release IP/08/807, 28.5.2008. See also Commission press releases IP/01/314 (of 5.3.2001) and IP/02/824 (of 5.6.2002) regarding the agreement reached between FIFA and the Commission on 5.3.2001 on FIFA Regulations on international football transfers, and the

<sup>122</sup> Case C-325/08 - *Olympique Lyonnais*, §§ 39.

from the TPO ban may be inherent for ensuring the objective at issue.

#### Football clubs' independence

Considering that this objective is intended to prevent clubs from losing their independence in the context of players' transfers by way of undue influence of third parties – a situation that has the potential of generating conflicts of interest – this objective may be deemed as legitimate. Indeed, if clubs' independence is compromised, this has also the potential to negatively affect the integrity of football and its competitions, as the same third party may, *inter alia*, influence and/or condition transfers of players between competing clubs.

Based on the above premises, the ban of TPO may be deemed as inherent to the restriction arising from the FIFA rule as it potentially eliminates the risk of clubs' independence being affected.

#### Football clubs' financial integrity

In light of the CJEU case law<sup>123</sup>, clubs' financial stability is not considered a legitimate objective in itself, but rather as an instrumental objective aimed at achieving the legitimate objective of sporting competitive balance between clubs participating in the same competition<sup>124</sup>. The CJEU considered that “*the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.*”<sup>125</sup>.

H. VÖPEL notes that “[a]t this stage, we just take note of the fact that it is doubtful that the «long-term financial stability» of club football can be considered, as such, as being a legitimate objective under EU Law. This does not mean that the long-term financial stability of club football is not a positive concept; it simply means that this value does not, as such, justify restrictions on competition.”<sup>126</sup>.

In light of the above, it is doubtful to consider clubs' financial integrity as a legitimate

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<sup>123</sup> Case C-415/93, *URBSF v Bosman*.

<sup>124</sup> See also VÖPEL, H. (2013). Is Financial Fair Play Really Justified? An Economic and Legal Assessment of UEFA's Financial Fair Play Rules. *HWWI Policy paper*. 79: pp. 24-25.

<sup>125</sup> Case C-415/93, *URBSF v Bosman*, § 107.

<sup>126</sup> VÖPEL, H. (2013). *op. cit.*: p. 25.

objective that may justify restrictions on competition.

### Protection of football players' professional freedom

As far as this objective concerns players' freedom of movement, as EU workers, it may be regarded as a legitimate objective in light of the *acquis communautaire*.

Indeed, in *Bosman*, the CJEU recognized players' right to free movement as EU workers and, assuming that TPO poses the risk to negatively affect this freedom, by banning it FIFA eliminates this risk and the restriction arising from the rule may be inherent for ensuring the objective at issue.

#### *c. Is the TPO ban proportionate in light of the objectives pursued?*

The methodology adopted by the Commission, following the *Meca-Medina* judgement, requires the sporting rule to be proportionate in relation to the objectives pursued in order for it to be compatible with Art. 101(1) TFEU<sup>127</sup>. Hence, it is required to assess whether the rule in question does not go beyond what is necessary to achieve its objectives, which implies that no less intrusive restrictions are equally suitable to achieve the legitimate aims pursued<sup>128</sup>. As noted by W. SAUTER<sup>129</sup>, the *Meca-Medina* proportionality assessment is based on the *necessity test* which, apart from the verification of the inherence and legitimacy of the objectives pursued by the sporting rule, also requires that the sporting rule at issue, among the available measures, is the least restrictive effective mean.

As referred in SECTION V.(ii).b., *fairness of football competitions*, the need to *safeguard contractual stability* and *clubs' financial integrity* and the restrictions arising from the TPO ban to attain these objectives tend to fail under the legitimacy and/or inherence assessment conducted above. Therefore, the proportionality analysis shall be focused in relation to the objectives that are seemingly legitimate and inherent such as (i) *integrity of football and its competitions*, (ii) *need to protect the solidarity mechanism and training compensation*, (iii) *protection of clubs' independence* and (iv) *protection of players' professional freedom*.

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<sup>127</sup> EUROPEAN COMMISSION (2007a). *op. cit.*: p. 69.

<sup>128</sup> *Meca-Medina* case, §§ 42 and 47. See also TRAINOR, N. (2010). The 2009 WADA Code: A More Proportionate Deal for Athletes?. *Entertainment and Sports Law Journal*. Vol. 8. No. 1.

<sup>129</sup> SAUTER, W. (2014). Proportionality in EU competition law, *European Competition Law Review*. Vol. 35. Issue 7. Thomson Reuters (Professional) UK Limited and Contributors: pp. 327 and 329.

As explained above, one of the FIFA's main concerns is the lack of transparency arising from TPO deals, which in turn poses the risk to influence the uncertainty of sports income (and therefore hinder the integrity of football and its competitions) and to have a negative impact on the other above identified objectives. But is a complete ban of TPO is the most suitable (and/or the only) way to avoid such risk?

As a preliminary note, it should be noted that the premise behind this assessment is that there is actually a reasonable justification that TPO must be governed by FIFA. However, one may question if there should be any rule at all to govern this matter in the same way and that is applicable to all football associations under the auspices of FIFA. Indeed, if there is actually a competitive imbalance between clubs and leagues across the EU, should this matter be governed instead by each national football association as a tool to *balance* the competition between clubs from different countries?<sup>130</sup>

In this regard, the CDES Report notes that the following instruments for regulating TPO were considered<sup>131</sup>: (i) regulatory instruments; and (ii) economic incentive instruments, *“which seek to modify the behaviour of agents through measures affecting their revenue (taxes, caps, subsidies, etc.), or instruments that directly establish the quantities permitted (quotas)”*.

A survey conducted with several football actors in the context of the CDES Report identified four different alternatives to address the TPO, namely: a complete ban, restrictive TPO regulations (but less stringent than a ban), minimum regulation or no regulation at all<sup>132</sup>.

Regarding a regulatory approach aimed at eliminating TPO, the CDES Report considers that *“[t]his kind of approach could take two forms (...) the first approach could take the form of a regulatory ban implemented by football's governing bodies, based on the English example. However, another option could be the implementation of severe economic instruments along with transparency-driven instruments that would aim to eradicate the supply side of the market in the short term”*<sup>133</sup>.

Regarding the solution of adopting restrictive TPO regulations, *“[t]his scenario differs*

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<sup>130</sup> The ultimate result of such an approach, if confirmed, might well be that TPO should not be governed at all by FIFA, but instead left to each national football association to decide which is the best way to tackle this practice.

<sup>131</sup> P. 11.

<sup>132</sup> Pp. 12-13.

<sup>133</sup> P. 13.

*from the previous one [a regulatory approach aimed at eliminating TPO] only according to the extent to which the instruments to dissuade stakeholders are implemented. It is not aimed at eliminating TPO practices, but rather at improving the transparency and, therefore, at limiting abuse. (...) The main rationale would be to improve transparency by implementing rules for the disclosure of specific data such as the list of players and third parties involved in TPO arrangements and details of third party activities. Transparency would bring legal certainty.”<sup>134</sup>.*

Lastly, the CDES Report highlights that a scenario of liberalisation of TPO (minimum or no regulation) “*implies that the free functioning of the market should lead to the optimal equilibrium. However, the economic theory would discourage the liberalisation of TPO practices as several market failures highlighted in the report would actually lead to a sub-optimal equilibrium*”.

In terms of possible economic incentives, the CDES Report considered, *inter alia*, the following<sup>135</sup>:

01. Establishment of a maximum percentage of a player’s economic rights that could be held by a single third party, as well as by several third parties – in relation to this incentive, it is noted that “[t]his element is important, as the fundamental issue is that of limiting the influence of third parties in club decisions. The dilution of the same percentage among several third parties limits the risk of influence”;
02. Setting of quotas: (i) limitation of the number of third parties able to obtain a percentage of the economic rights to a player, in order to reduce difficulties in transfer negotiations that arise when too many parties are involved; or (ii) limitation of the number of players *per* club who can be involved in TPO practices, in order to reduce the risk of the club losing control over its own football strategy<sup>136</sup>.

The above conclusions contained in the CDES Report show that there is at least one valid and viable alternative to a complete ban of TPO to address the concerns related to this practice, which is stricter regulatory approach, combined with possible economic

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<sup>134</sup> CDES Report: p. 13.

<sup>135</sup> P. 12.

<sup>136</sup> *Ibid.*

incentives.

This alternative solution, instead of a complete ban, has already been addressed and supported by several Authors, who identify the following tools to solve the most common issues related to TPO:

01. Establishment of a sports authority responsible for supervision of all TPO related matters, supervision which shall include both international and national football associations<sup>137</sup>;
02. Creation of a registration system, imposing mandatory disclosure of all TPO transactions and third parties involved (in particular the ultimate beneficial owners), together with sanctions for non-compliance, as well as the registration of third parties that invest in players' economic rights<sup>138</sup>;
03. Setting of quotas, in order to limit (i) the percentage of players' economic rights that a third party may hold; (ii) the number of a club's players whose economic rights may be held by a third party; and (iii) the number of clubs competing in the same league in which a third party may hold players' economic rights<sup>139</sup>;
04. The authority responsible for TPO supervision may implement standard draft TPO agreements and all the agreements entered into should be subject to its control<sup>140</sup>;
05. Prohibition of TPO agreements outside Summer and Winter transfer windows<sup>141</sup>;
06. Mandatory requirement for TPO investors to fill a declaration of conformity with the applicable rules and to submit to the relevant football institutions

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<sup>137</sup> V. B. PIRES, L. (2013). Direitos económicos de um atleta detidos por terceiros – proibição ou regulação?. *Desporto & Direito – Revista Jurídica do Desporto*. Coimbra Editora. Ano X. 29. Coimbra: p. 186; V. B. PIRES, L. (2013a). Third Party Ownership – to ban or not to ban?. *LawInSport*; GHIRA ZINHO, M.L. (2015). *op. cit.*: p. 208; and DE ALMEIDA PINTO VIEIRA, M.J. (2015). *op. cit.*: p. 229.

<sup>138</sup> V. B. PIRES, L. (2013). *op. cit.*: pp. 186-187; VEIGA GOMES, F. (2012). Third Party Player Ownership. *EPFL Sports Law Bulletin*. 10/2012: p. 65; VEIGA GOMES, F. (2015). Dos Direitos Económicos no Direito do Futebol. In: COSTA, R. and BARBOSA, N. (eds.). *IV Congresso de Direito do Desporto*. Almedina. Coimbra: pp. 151-170; RECK, A. *op. cit.*: p. 54; LEAL AMADO, J. and LORENZ, D. (2014). Os “Direitos Económicos de Terceiros” sobre os atletas profissionais; mitos, luzes e sombras. *Revista da Faculdade de Direito da Universidade Lusófona do Porto*. Vol. 5. no. 5: p. 62; LEAL AMADO, J. and LORENZ, D. (2013). Os chamados «direitos económicos»: o praticante desportivo feito mercadoria?. *Desporto & Direito – Revista Jurídica do Desporto*. Coimbra Editora. Ano X. 29: p. 197; and SPANISH FOOTBALL LEAGUE (2015). *op. cit.*

<sup>139</sup> VEIGA GOMES, F. (2012). *op. cit.*: p. 65; LEAL AMADO, J. and LORENZ, D. (2014). *op. cit.*: p. 62; V. B. PIRES, L. (2013). *op. cit.*: p. 187; GHIRA ZINHO, M.L. (2015). *op. cit.*: p. 210-211; DE ALMEIDA PINTO VIEIRA, M.J. (2015). *op. cit.*: p. 229; and SPANISH FOOTBALL LEAGUE (2015). *op. cit.*

<sup>140</sup> V. B. PIRES, L. (2013). *op. cit.*: p. 187. In this regard, FERRARI, L. (2012). *op. cit.*: pp. 68-69, suggests that the potential issues arising from TPO “should be dealt with contractually”. SPANISH FOOTBALL LEAGUE (2015). *op. cit.*, also suggests that certain clauses that may limit the independence and autonomy of the clubs should be prohibited.

<sup>141</sup> V. B. PIRES, L. (2013). *op. cit.*: p. 187.

jurisdictions<sup>142</sup> – similar to the recent rules on working with intermediaries adopted by FIFA<sup>143</sup>, by which clubs and players may be required to disclose to their respective associations all the agreements entered into with TPO entities and to use reasonable endeavours to obtain a similar declaration signed by the relevant TPO entity; if they fail to comply with such obligations, sanctions may be applied;

07. Persons that hold a relevant shareholding in a club or have a relevant connection with clubs (e.g., directors, managers, etc.) should not be allowed to own players' economic rights<sup>144</sup>;
08. TPO contracts shall be always subject to players' express agreement, otherwise they should be void<sup>145</sup>;
09. Imposition of maximum remuneration limits for the investor<sup>146</sup>; and
10. Stricter and harmonized sanctions in case of undue influence and non-compliance with the rules in force<sup>147</sup>.

F. VEIGA GOMES<sup>148</sup> is of the opinion that TPO must be regulated (and not banned) “*in order to: 1) have a higher level of transparency; 2) reduce as much as possible third party influence in employment and transfer related matters; and 3) identify possible conflicts of interest.*”. Registration of TPO<sup>149</sup>, quotas<sup>150</sup>, a mandatory requirement for the investors “*to declare before FIFA that they shall not attempt to influence the Club or the Player and accepting the jurisdiction of the football institutions*”<sup>151</sup>, and more severe and harmonized sanctions in case of undue influence are also solutions pondered by this Author<sup>152</sup>.

A. RECK considers that TPO “*is a legitimate business and – properly regulated – a*

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<sup>142</sup> VEIGA GOMES, F. (2012). *op. cit.*: p. 65; and V. B. PIRES, L. (2013). *op. cit.*: p. 187.

<sup>143</sup> FIFA Regulations on Working with Intermediaries, 21.3.2014, entered into force on 1.4.2015, Arts. 6 and 8.

<sup>144</sup> V. B. PIRES, L. (2013). *op. cit.*: p. 187; GHIRA ZINHO, M.L. (2015). *op. cit.*: p. 211; and SPANISH FOOTBALL LEAGUE (2015). *op. cit.*

<sup>145</sup> VEIGA GOMES, F. (2012). *op. cit.*: p. 65; and V. B. PIRES, L. (2013). *op. cit.*: p. 187.

<sup>146</sup> SPANISH FOOTBALL LEAGUE (2015). *op. cit.*

<sup>147</sup> VEIGA GOMES, F. (2012). *op. cit.*: p. 65; LEAL AMADO, J. and LORENZ, D. (2014). *op. cit.*: p. 56; and V. B. PIRES, L. (2013). *op. cit.*: p. 188.

<sup>148</sup> VEIGA GOMES, F. (2012). *op. cit.*: p. 65, free translation from the Portuguese language, and VEIGA GOMES, F. (2015). *op. cit.*: pp. 151-170.

<sup>149</sup> VEIGA GOMES, F. (2012). *op. cit.*: p. 65.

<sup>150</sup> So clubs “*may have a minimum interest and control over the investment and in order to effectively control conflicts of interest situations*”, *ibid.*, free translation from the Portuguese language.

<sup>151</sup> *Ibid.*

<sup>152</sup> In particular, “*in case of any attempt to influence in employment and transfer related matters, in order to prevent unlawful conducts*”, *ibid.*, free translation from the Portuguese language.

good alternative source of income and financial tool for clubs and is really needed in these times of economic crisis”<sup>153</sup>. Therefore regulation shall aim to protect sporting integrity<sup>154</sup>, player’s rights<sup>155</sup> and transparency<sup>156</sup>.

J. LEAL AMADO and D. LORENZ<sup>157</sup> also support a regulatory solution involving disclosure and transparency regarding TPO deals (through a mandatory registration system) and limits on percentage of economic rights to be held by third parties investors. Furthermore, the Authors argue that such regulation must be cumulated with a strict analysis of the contractual clauses contained in TPO agreements, sanctioning those clauses that hinder sports competition or athletes’ labour rights<sup>158</sup>.

In this regard, R. LOMBARDI *et al.* state that “*the expression of clear and transparent rules for the TPO aim at guaranteeing the balance of sports competitions in observance of growth demands of the field, with an increase in the last few years of the level of debt of many clubs*”<sup>159</sup>.

The Spanish Football League argues that the full prohibition will not solve issues related to this practice but, instead, “*will only trigger a search for ‘creative’ alternatives to fulfil the same purpose, using fraud and/or other contractual fictions*” and will serve as an incentive “*to the creation of a ‘black market’ that would be out of regulatory control and would therefore endanger the very integrity of the competitions*”<sup>160</sup>. It also considers that the TPO ban “*will be very difficult to enforce and it will generate a great deal of conflicts, which is obviously not a desirable outcome*”<sup>161</sup>.

In this regard, A. RECK highlights<sup>162</sup> that “*FIFA’s remedy might be worse than the disease*” as far as a complete ban will maintain TPO practices and investors out of the jurisdiction of the relevant football authorities. Since FIFA can only sanction its own

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<sup>153</sup> RECK, A. (2012). *op. cit.*: p. 54.

<sup>154</sup> Which shall be aimed at “*limiting the possible influence of third parties, with a concrete definition of the notion of unduly influence and the practices that fall under it*”, *ibid.*

<sup>155</sup> By “[i]mposing at regulatory level the player’s conformity in any contract and establishing further limits, basically related to contracts signed with straw man clubs with no sporting interest in the player”, *ibid.*

<sup>156</sup> In this regard, RECK, A., *ibid.*, suggests “[e]stablishing mandatory disclosure of any [TPO] agreement, and making its approval subject to revision by the relevant Association” and “[a]lso, ordering payments to third parties to be made exclusively through the relevant association”.

<sup>157</sup> LEAL AMADO, J. and LORENZ, D. (2014). *op. cit.*: p. 62. See also LEAL AMADO, J. and LORENZ, D. (2013). *op. cit.*: p. 197.

<sup>158</sup> LEAL AMADO, J. and LORENZ, D. (2014). *op. cit.*: p. 56.

<sup>159</sup> LOMBARDI, R., MANFREDI, S. and NAPPO, F. (2014). *op. cit.*: p. 44.

<sup>160</sup> SPANISH FOOTBALL LEAGUE (2015). *op. cit.*

<sup>161</sup> *Ibid.*

<sup>162</sup> RECK, A. (2015). The impact of the TPO Ban on South American Football. *Symposium on FIFA’s TPO ban*. website of Asser International Sports Law Blog.



members (e.g., clubs and players) “if a club or a player enters into a TPO agreement, such player or club might be subject to disciplinary sanctions and the contract will still be valid and enforceable”, taking into account that “it is not unthinkable that a player or a club surrendering to the need of funds and signing a TPO agreement despite FIFA’s ban, thereby placing themselves in a difficult position”. In accordance with this Author, “the ban will have the opposite effect to what was sought: Players and clubs will be more vulnerable in their relationship with the third-party than before the introduction of art. 18ter RSTP”.

A. RECK also adds that in order to circumvent the TPO ban, there will be an augment in the use of the so-called *bridge transfers* which are defined by FIFA as transfers that “involve clubs collaborating to transfer players through a ‘bridge’ club to a destination club where the player was never fielded by the bridge club.”<sup>163</sup>. He points that “[w]ith this [manoeuvre], the TP owner artificially enjoys all the benefits of being a club, like retaining a percentage of the player’s future transfer or controlling the player’s career by signing a long term contract with a huge buyout clause loaning the player to different clubs each year.[6] According to the FIFA regulations any club that had ever registered the player is not a ‘third party’ (...). There is no further requirement, no ‘sporting interest’ in the registration or playing time, the simple act of registration allows a club to have a share of the player’s future transfers. To this regard, while it is true that FIFA already sanctioned clubs for ‘bridge transfers’[8], it was only an isolated case (still pending at CAS) and we can see examples of patent ‘bridge transfers’ in every transfer window and in the top-5 leagues, not just in minor competitions.”<sup>164</sup>.

Despite the above arguments in favour of stricter regulation of TPO deals, there are still Authors that raise doubts on the efficiency of such regulatory solutions. This is the case of A. DUVAL<sup>165</sup>, who argues that “FIFA is incapable to properly regulate and control the TPO investment market. This is due to the fact that FIFA does not dispose of the legal competence needed to force investment funds to disclose information”.

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<sup>163</sup> FIFA (2014a). Press release *Argentinian and Uruguayan clubs sanctioned for bridge transfers*.

<sup>164</sup> RECK, A. (2015). *op. cit.*

<sup>165</sup> DUVAL, A. (2015). *Unpacking Doyen’s TPO Deals: In defence of the compatibility of FIFA’s TPO ban with EU law*. website of Asser International Sports Law Blog.

Others, such as R. POLI<sup>166</sup>, suggest that a *holistic approach* is needed which should “involve reforming the existing transfer system and making it better suited to fulfil the purpose for which it was first implemented and has since been adapted as previously described in this paper”, notably with regard to contractual stability and promotion of training. This Author adds that “[a]n efficient measure would be to entitle each team in which a player has passed through to a compensation for each fee paying transfer taking place over the course of the player’s professional career on a *pro rata* basis to the number of official matches played at the club”<sup>167</sup>.

All in all, while TPO opponents raise doubts about the efficiency of stricter regulatory approach to this practice, several solutions were identified (even by the CDES) and recognised as potential alternatives to the outright ban. *Prima facie*, stricter regulation of TPO tends to be a less restrictive approach than an outright ban. However, the proportionality of the TPO ban will certainly depend on a careful assessment of such alternative solutions’ potential to effectively pursue the objectives identified by FIFA. The argument that FIFA does not have legal competence to regulate and to control TPO entities does not seem to be convincing, as more detailed obligations and the burden to ensure the compliance with the applicable rules may be imposed on clubs and players, who are subject to FIFA and national football associations jurisdiction<sup>168</sup>.

In light of the above, to the extent that it is confirmed that a regulatory approach is, materially, viable to tackle the issues raised by TPO deals, the FIFA rule is not a proportionate measure and cannot be deemed compatible with Art. 101 TFEU.

### ***(iii) Step 3. – Effect on trade between Member States***

The concept of *effect on trade between Member States* has been given a broad interpretation by the CJEU, including in the field of competition law<sup>169</sup>. The court has consistently considered that if a decision or an agreement is “*capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may*

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<sup>166</sup> POLI, R. (2015). Third-party entitlement to shares of transfer fees: problems and solutions. *Symposium on FIFA’s TPO ban*. website of Asser International Sports Law Blog.

<sup>167</sup> *Ibid.*

<sup>168</sup> A solution that was, for instance, adopted in case of the intermediation activity in the context of the 2014 FIFA Regulations on Working with Intermediaries – see Arts. 2, 6, 8 and 9.

<sup>169</sup> Cases 155/73, *Sacchi*, 30.4.1974, and 172/80, *Züchner v Bayerische Vereinsbank*, 14.7.1981, as noted by COPPO, G. (2011). *op. cit.*: p. 307.

*have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States*<sup>170</sup>.

In this regard the Commission highlights that “*rules adopted by international sport associations will normally affect trade between Member States*”<sup>171</sup>. As noted above, in SECTION III, a relevant part of transactions involving TPO takes place in international transfers of players, in particular in those involving cross-border transactions between European clubs. In 2015, 13,558 football players’ transfers were completed all over the world and in terms of spending on transfer fees, the total amount reached USD 4.18 billion, which represents a 44.2% growth since 2011<sup>172</sup>.

Considering that RSTP rules, in particular those concerning the TPO ban are applicable to clubs from different national football associations and therefore affect (or, at the least, have the potential to affect) intra-European player’s transfers, it is difficult to sustain that such prohibition does not have an effect on trade between Member States<sup>173</sup>. As noted by G. COPPO, “*it must be taken into account that the case law of the ECJ does not require that trade between Member States is actually affected, being sufficient a reasonable foreseeability of such an effect. European clubs have interest in looking across their national borders to recruit players from other countries, either for economic or sporting reasons. From their side, players may want to move to a club where they are paid according to their skills. It can be therefore concluded that players’ movement affects inter-state trade*”<sup>174</sup>.

Hence, it is reasonable to conclude that TPO ban poses the risk to potentially affect intra-European players’ transfers, which in several cases involve at least two Member States, and thus has the potential to affect intra-EU trade.

**(iv) Step 4. – Does the TPO ban fulfil the conditions of Art. 101(3) TFEU?**

In accordance with Art. 101(3) TFEU where a restriction under Art. 101(1) TFEU is found, such restriction may be justified when it generates overriding efficiency gains.

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<sup>170</sup> Cases C-306/96, *Javico v Yves Saint Laurent Parfums*, 28.4.1998, and 5/69, *Voelk v Vervaecke*, 9.7.1969. In this regard, see also COPPO, G. (2011). *op. cit.*: p. 307.

<sup>171</sup> EUROPEAN COMMISSION (2007a). *op. cit.*: footnote 178, p. 67.

<sup>172</sup> FIFA (2016). *op. cit.*

<sup>173</sup> In this regard, COPPO, G. (2011). *op. cit.*: p. 307.

<sup>174</sup> *Ibid.*

As noted by G. COPPO, “Article 101(3) may therefore be thought of as a balancing mechanism by which an agreement’s procompetitive benefits are weighted against its restrictive effects”<sup>175</sup>. Thus, the prohibition contained in Art. 101(1) TFEU may be declared inapplicable in case of agreements or decisions which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

First and foremost it should be noted that there are objective doubts on whether the TPO ban produces actual benefits to football that outweigh the restrictions arising from this rule. As detailed in SECTION V.(ii).a. above, there are objective reasons to argue that this rule has the potential to (i) limit or control investment of the clubs; (ii) limit clubs’ sources of supply in terms of players, and (iii) limit clubs’ (and consequently, the overall) production. Such conducts (as the TPO ban) tend to be construed by the Commission as restrictions *by object* and *by effect*.

Furthermore, it is doubtful that the TPO ban is indispensable for attaining the objectives it is intended to pursue, as far as there are other potential less restrictive options for attaining the same objectives, as demonstrated in SECTION V.(ii).c. above. Therefore, to the extent that TPO ban fails the proportionality test it is difficult to sustain exemption of this rule under Art. 101(3) TFEU.

As such, while an exemption may be in theory *available* to the TPO ban under Art. 101(3) TFEU, there are objective arguments that seem to rule out such possibility, which ultimately means that this rule has the potential to infringe Art. 101(1) TFEU and therefore to be *put aside* by the relevant competition authorities, in particular by the Commission.

## **VI. Conclusions**

The assessment of the compatibility of the TPO ban with Art. 101 TFEU was conducted by first establishing a definition and the relevant elements of TPO, in order to define the

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<sup>175</sup> COPPO, G. (2011). *op. cit.*: p. 308. See also EUROPEAN COMMISSION (2007a). *op. cit.*: p. 69.

concrete scope of the study. Furthermore, the preliminary identification of the implications of the measure and its assessment under the methodology adopted by the CJEU and the Commission, allowed to draw several objective reasons to question the legality of the FIFA decision under Art. 101 TFEU.

First, the TPO ban can be deemed under Art. 101 TFEU as a decision of an association of undertakings which is capable of having effects on trade between Member States, considering that the practice of football is an economic activity for clubs and the rule is capable of hampering players' transfers between clubs of different EU countries.

In addition, although the overall context in which the rule was adopted by FIFA may *prima facie* suggest that there are legitimate goals in banning TPO – such as *integrity of football and its competitions, football clubs independence, protection of players' professional freedom* – there are also valid arguments to sustain that this rule is an unnecessary and disproportional restriction of competition *by object* and *by effect*.

The conducted assessment highlights that a rule such as the TPO ban (i) has as its object and effect to limit clubs' investment and supply sources in terms of players, and (ii) limits clubs' (and the overall) production and the quality of the production. With this rule clubs are *de jure et de facto* deprived of a previously available funding source which is negatively reflected in their capacity to invest in sporting activities and in the *acquisition* of new players they could not otherwise afford. As a consequence, the TPO ban also has the potential of negatively affecting the market of football events played regularly throughout every year, considering that clubs ability in increasing the quality of their sporting performance and the access to new players is hindered.

This is particularly relevant taking into account that, per assessed elements, TPO is often and mainly used by smaller clubs and clubs from minor leagues to enhance their competitiveness *vis-à-vis* bigger and richer clubs. In this context, by prohibiting TPO, FIFA creates a greater imbalance and a larger gap between European clubs, which ultimately distorts competition within EU football competitions and respective relevant markets.

There are also several grounds to sustain that the restrictions caused by the TPO ban are not inherent in the pursuit of some of its objectives, some of which are not even legitimate to justify the identified competition restrictions. For instance, while the

restrictions of the rule do not seem to be inherent to safeguard *fairness of football competitions* and *contractual stability*, as detailed above, the objective of *football clubs' financial integrity* has not been considered legitimate by the CJEU.

It is also questionable that the rule is proportional in relation to the objectives pursued, considering that several potential less restrictive options, instead of an outright ban, are identified in order to tackle the same goals. Those options include regulation instruments of TPO, with penalties for non-compliant entities, and possible economic incentives (such as TPO quotas and maximum percentage of a player's economic rights that could be held by a single third party), which are mentioned in the CDES Report about TPO (a study mandated by FIFA) and also acknowledged by several Authors.

To the extent that TPO ban fails the proportionality test and cumulatively does not produce benefits to football that outweigh the restrictions arising from it, it also may not be exempted under Art. 101(3) TFEU – as stated above, the potential effects of the rule may well be regarded as detrimental to both clubs and football.

Hence, there are material arguments to consider that the TPO ban is a decision of an association of undertakings (FIFA) that has as its object or effects the prevention, restriction or distortion of competition within the internal market, is not proportional, nor it can be exempted under Art. 101 (3) TFEU, and is therefore incompatible with Art. 101 TFEU.

Future research on the compatibility of the FIFA rule with Art. 101 TFEU may and should certainly benefit from further data on the impact the measure had since its adoption and on the results achieved in pursuing its objectives. At this stage, such data is available to a limited extent, taking into consideration the *novelty* of the FIFA rule, which entered into force in May 2015.

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## ANNEX 1

### *“18ter Third-party ownership of players’ economic rights*

- 1. No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.*
- 2. The interdiction as per paragraph 1 comes into force on 1 May 2015.*
- 3. Agreements covered by paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended.*
- 4. The validity of any agreement covered by paragraph 1 signed between 1 January 2015 and 30 April 2015 may not have a contractual duration of more than 1 year beyond the effective date.*
- 5. By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety, including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.*
- 6. The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article.”<sup>176</sup>*

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<sup>176</sup> FIFA Regulations on the Status and Transfer of Players (October 2015 edition), retrieved at [http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatusandtransfer\\_2015\\_e\\_v051015\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatusandtransfer_2015_e_v051015_neutral.pdf).

## ANNEX 2

### *“20 Training compensation*

*Training compensation shall be paid to a player’s training club(s): (1) when a player signs his first contract as a professional, and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player’s contract. The provisions concerning training compensation are set out in Annexe 4 of these regulations.”<sup>177</sup>*

### *“21 Solidarity mechanism*

*If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution). The provisions concerning solidarity contributions are set out in Annexe 5 of these regulations.”<sup>178</sup>*

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<sup>177</sup> FIFA Regulations on the Status and Transfer of Players (October 2015 edition), retrieved at [http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatusandtransfer\\_2015\\_e\\_v051015\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatusandtransfer_2015_e_v051015_neutral.pdf).

<sup>178</sup> *Ibid.*

